UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OKLAHOMA

STATE OF OKLAHOMA,	)	
	)	
Plaintiff(s),	)	
	)	
vs.	)	Case No. 05-CV-329-TCK-SAJ
	)	
TYSON FOODS, INC., et al.,	)	
	)	
Defendant(s).	)	

ORDER

On this 23rd day of May, 2006, the Court heard argument on Plaintiff's motion for leave to expedite discovery. [Docket No. 210]. Plaintiff requests discovery prior to the required Fed. R. Civ. Proc. 26(f) discovery planning conference. Defendant objects. The Court has considered the arguments of the parties, the briefs submitted by the parties, and the referenced case law. Plaintiff's motion is **granted**. Plaintiff may issue discovery requests to Defendants and may issue subpoenas. The Court, in this Order, addresses only the ability of Plaintiff to begin the process to obtain the limited discovery requested in Plaintiff's motion. The Court is not ruling on the merits of Plaintiff's request with regard to Defendants, parties, or non-parties.

During the hearing the parties noted that no Joint Status Report has been filed in this case. The parties are ordered to file a Joint Status Report by April 13, 2006.

I. BACKGROUND

Plaintiff filed a Complaint in this Court on June 13, 2005. [R. at 2]. Plaintiff represents that after filing the Complaint Plaintiff did not serve Defendants because Plaintiff

was pursuing settlement talks with the Defendants and had hopes that the settlement discussions would be successful.

Plaintiff filed a First Amended Complaint on August 19, 2005, and served Defendants. Defendants entries of appearance began in September 2005. Defendants filed numerous motions to dismiss in October 2005.

On November 14, 2005, Defendants filed a motion to stay the proceedings. [Docket No. 125]. Plaintiff occasionally references the "stay" of this action due to the parties awaiting the decision of the Supreme Court with respect to the filing by the State of Arkansas of a Motion for Leave to File a Bill of Complaint and Bill of Complaint. However, this Court has reviewed the docket sheet in this action and cannot find that this action was ever stayed by the District Court.[1/] When the Supreme Court declined the motion for leave to file a bill of complaint, Defendants, on February 22, 2006, filed a notice of withdrawal of the motion to stay the proceedings in this Court. Defendants' motion was granted by the District Court on March 8, 2006, and the motion to stay was withdrawn without ever being addressed on the merits. [Docket No. 223].

Plaintiff filed their motion for limited expedited discovery on February 22, 2006. [Docket No. 210]. This motion is the first discovery motion heard by this Court in this action. Plaintiff notes that the parties have not had a Fed. R. Civ. Proc. 26 conference, have not prepared or submitted a Joint Status Report, and have not made their initial disclosures.

[1/] Plaintiff's counsel discussed the "stay" of this action during argument. In briefing, Plaintiff references one of Defendants' attorneys comments, in state court, that "Judge Ellison has put it [the case] on ice for the moment." *See* [Docket No. 210] at 3.

II. DISCOVERY PRIOR TO RULE 26(f) CONFERENCE PERMISSIBLE

Fed. R. Civ. Proc. 26(f) requires the parties, "as soon as praticable and in any event at least 21 days before a scheduling conference is held or a scheduling order is due under Rule 16(b), confer to consider the nature and basis of their claims and defenses and the possibilities for a prompt settlement or resolution of the case, to make or arrange for the disclosures required by Rule 26(a)(1), and to develop a proposed discovery plan. . . ." Fed. R. Civ. Proc. 26(f). Fed. R. Civ. Proc. 26(d) provides that a party may not seek discovery from any source prior to the Fed. R. Civ. Proc. 26(f) conference unless certain exceptions are met, agreement of the parties is reached, or by order. Fed. R. Civ. Proc. 26(d).

The parties agree that no Fed. R. Civ. Proc. 26(f) conference has occurred[2/] and that no initial disclosures have been exchanged. Therefore, in accordance with Fed. R. Civ. Proc. 26(d), no discovery may occur absent agreement of the parties or an order of the Court.

Courts addressing the issue have concluded that discovery in advance of a Fed. R. Civ. Proc. 26(f) conference is permissible upon a showing of good cause. Generally, courts have considered the scope of the requested discovery, the purpose of the requested discovery, the burden on the defendants in complying with the request, how far in advance of the Fed. R. Civ. Proc. 26(f) conference the discovery request is made, and whether a preliminary injunction motion is pending. *See In re Fannie Mae Derivative Litigation*, 227 F.R.D. 142, 143 (D.D.C. 2005); *Pod-Ners, LLC v. Northern Feed & Bean of Lucerne Ltd.*

[2/] The parties presumably met to discuss the case and potential settlement during the time frame that Plaintiff represents the complaint was initially filed but not served because the parties were attempting to settle the action. However, even assuming these discussions occurred, Fed. R. Civ. Proc. 26 additionally requires arrangements for initial disclosures and development of a proposed discovery plan.

Liability Co., 204 F.R.D. 675 (D. Col. 2002). In addition, expedited discovery is permitted "where physical evidence may be consumed or destroyed with the passage of time. . . ." *Qwest Communications International, Inc. v. Worldquest Networks,* Inc. 213 F.R.D. 418, 419 (D. Col. 2003).

Defendant relies primarily on *Notaro v. Koch*, 95 F.R.D. 403 (S.D.N.Y. 1982), to support Defendant's position that Plaintiff's requested discovery should be denied. The Court is not persuaded that *Notaro* is applicable to this case. *Notaro* was decided prior to the enactment of the current Rule and involved a deposition of a party within 30 days of the commencement of the action. The differences between *Notaro* and this case are obvious. In this case, at least seven months have passed since Defendants were served, and Plaintiff seeks testing of existing evidence rather than a party deposition. *See also Semitool, Inc. v. Tokyo Electron America, Inc.*, 208 F.R.D. 273 (N.D. Cal. 2002) (rejecting *Notaro*).

Plaintiff represents that Spring is an important time during which Plaintiff must test because rainfall is higher in the Spring and because fertilizer application is higher in the Spring. Plaintiff additionally represents that because the poultry feed may be changed and because the change in the feed may result in a change to the resulting poultry waste, that Plaintiff must test or the possibility exists that currently available evidence will change and be unavailable for testing.

Defendants contradict Plaintiff's representations and contend that neither rainfall nor fertilizer applications are greater during the Spring months. Defendants additionally represents that no "industry-wide" poultry feed exists and that changes may or may not

occur on a regular basis to poultry feed. Both parties have presented some data to support their contentions.

The discovery requested prior to the Fed. R. Civ. Proc. 26(f) conference by Plaintiff is limited to what Plaintiff identifies as necessary to preserve the available evidence during a certain time frame. The scope of the requested discovery is limited and the purpose of the requested discovery is to preserve evidence. Defendants have been unable to sufficiently articulate a burden to Defendants or resulting prejudice to Defendants in permitting the issuance of the discovery requested by Plaintiffs prior to the Fed. R. Civ. Proc. 26(f) conference.[3/] The Court therefore concludes that Plaintiff may proceed with the proposed limited discovery requests and subpoenas prior to the Fed. R. Civ. Proc. 26(f) conference.

Defendants additionally assert that Plaintiff should be prohibited from engaging in discovery prior to a Fed. R. Civ. Proc. 26(f) conference because Plaintiff was dilatory and should not benefit from what Defendants characterize as Plaintiff's fault in failing to advance discovery.

In the Northern District of Oklahoma, LCvR 16.1 requires the parties to submit a Joint Status Report no later than 120 days from the date the case was filed. This rule also

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[3/] Although the Court asked Defendants about resulting prejudice to Defendants at the hearing, the majority of Defendants' arguments addressed the merits of the discovery requests that Defendants anticipate Plaintiff will draft. The merits of these arguments are not yet before the Court. At issue at this time is whether or not Plaintiff may proceed with discovery prior to a Rule 26(f) conference. At least one Defendant noted that because initial disclosures have not yet occurred, some prejudice may result to Defendants due to the lack of such disclosures. The Court is sympathetic to concerns voiced regarding initial disclosures. The Court is ordering the parties to submit a Joint Status Report and comply with the initial disclosure requirements. Because of the parties' anticipated objections and subsequent motions with respect to Plaintiff's discovery requests, the initial disclosures may well be made prior to the occurrence of the testing which Plaintiff currently proposes. In any event, the current lack of initial disclosures does not convince the Court that Plaintiff should not proceed with the limited discovery requested. The Court does, however, encourage all parties to begin the Fed. R. Civ. Proc. 26(f) process as soon as practicable.

requires that the parties use the Joint Status Report form that is available in the Court Clerk's office. *See* LCvR 16.1. The Joint Status Report Form requires that initial disclosures be made within 14 days of the conference between the parties for the purpose of preparing the discovery plan. Fed. R. Civ. Proc. 26(a)(1) (disclosures to be made at or within 14 days of the Fed. R. Civ. Proc. 26(f) conference). The local rules also place the burden of filing the Joint Status Report on the Plaintiff. *See* LcvR 16.1(b)(A). In addition, sanctions may be imposed for the failure to comply with these rules. *See* LcvR 16.1(b)(2).

In this case the parties have not filed a Joint Status Report. No Fed. R. Civ. Proc. 26(f) conference has occurred and the parties have not made initial disclosures. Under the rules, Plaintiff bears the responsibility for preparing the Joint Status Report. Plaintiff suggests that Plaintiff acted very quickly in filing the motion for expedited discovery after the Supreme Court decision. Plaintiff is correct that Plaintiff's action occurred quickly relative to the Supreme Court decision. However, the current action in this Court was not stayed during the pendency of the Supreme Court proceeding and no other reason is posited by Plaintiff for the lack of activity during the pendency of the Supreme Court action. Furthermore, no explanation is provided for the failure by the parties, at some point over the last month, to participate in a Fed. R. Civ. Proc. 26(f) conference. Plaintiff's impediment to Plaintiff's current proposed discovery requests is present because the requisite Fed. R. Civ. Proc. 26(f) conference has not occurred. The Court is aware of nothing that prevented the parties from having a Fed. R. Civ. Proc. 26(f) conference at any point during the preceding month while this motion was pending.

Although sanctions are permitted for the failure to submit the required Joint Status Report, the Court cannot conclude that sanctions would be appropriate in this case.

Further, although Defendants suggest that Plaintiff's failure to urge a Joint Status Report is fatal to Plaintiff's current motion, the Court cannot agree. The Court accepts Plaintiff's position that Plaintiff acted quickly after the Supreme Court decision and that Plaintiff was otherwise occupied or believed proceeding in this action inappropriate.[4/] Regardless, the Court will not deny Plaintiff's requested "expedited" discovery due to Plaintiff's failure to initiate a Fed. R. Civ. Proc. 26(f) conference and file a Joint Status Report.

The parties are ordered to file a Joint Status Report by April 13, 2006, and make initial disclosures as required by the Federal Rules of Civil Procedure. No reason has been presented to delay either the filing of the Joint Status Report or the exchange of the initial disclosures.

The Court also orders Plaintiff to submit the ODAFF biosecurity requirements to Defendants within five days of the date of this Order. Defendants shall review the requirements and respond to Plaintiff within ten days of receipt of the ODAFF biosecurity requirements and provide any additional requirements to Plaintiff that Defendants deem necessary.

At the hearing, Plaintiff represented that Defendants had seriously misrepresented information from the book "Groundwater Pollution Microbiology." Bitton, Gabriel and Gerby, Charles P. "Groundwater Pollution Microbiology" (1984). [Docket No. 226, Exhibit 11]. Defendants attach, as an exhibit to their Response Brief, chapter four from this book. Defendants, in footnote five of Defendants' Response Brief, represent the book as supporting the proposition that "soil itself filters out bacteria in rainwater and significantly

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[4/] As noted above, Plaintiff's reference one of Defendants' attorney as characterizing this proceeding as having been "put on ice" by Judge Ellison.

reduces bacteria concentrations before that rainwater reaches groundwater." [Docket No. 225, at 14, n.5]. Plaintiff quotes other portions of the same book, stating that groundwater was historically a reliable source of water because of the protection from soil as a filter, but that outbreaks of hepatitis A and viral gastroenteritis have been traced to contaminated groundwater. Based on these quotations from the book, Plaintiff asserts that Defendants seriously misrepresented the article. Neither Plaintiff nor Defendants quote the page number that they reference.

The Court has reviewed chapter four of the book, which is the portion of the book that Defendants attached to Defendants' brief. The Court agrees that, based upon a review of the materials attached by Defendants', the book is not fairly represented by Defendants in their brief. The chapter attached by Defendants does state that some bacteria is filtered out by the soil and that bacteria concentrations are reduced before it reaches groundwater. However, the chapter also provides that some bacteria and viruses may not be filtered out and are a concern. That conclusion should have been included in a full representation of the book. To Defendants' credit, the chapter which Defendants relied upon was attached for the Court to review. Curiously, the Court is unable to find the language quoted by Plaintiffs in the chapter four material which is attached by Defendants to Defendants' brief. Plaintiffs language may be from another portion of the book which was not included in the Defendants' attachments. Future references by both parties to supporting data or articles should include page citations. All parties are directed to be careful in their representations of authority and accurately portray what is cited.

Dated this 24th day of March 2006.

Sam A. Joyner
United States Magistrate Judge